Summer 7-26-2012

# The Color of Testamentary Freedom

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# THE COLOR OF TESTAMENTARY FREEDOM

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*Wills that prioritize the interests of nontraditional families over collateral heirs test courts' dedication to observing the posthumous wishes of testators. Collateral heirs who object to will provisions that redraw the contours of "family" are likely to profit from the incompatibility of testamentary freedom and social deviance. Thus, the interests of married, white adults may claim priority over nonwhite, unmarried others. Wills that acknowledge the existence of moral or social transgressions—namely, interracial sex and reproduction—incite will contests by collateral heirs who leverage their status as white and legitimate in order to defeat testamentary intent.*

*This Article turns to antebellum and postwar will contests between disinherited white heirs and mixed-race devisees to question the role of courts in defining "family" and the expectancy of collaterals to uphold this limitation. While other studies have separately examined the myth of testamentary freedom and argued for the legitimacy of diverse families, scholars have paid less attention to the color of inheritance. Drawing on Cheryl Harris's groundbreaking work on property and racial expectation interests, this Article illustrates the centrality of whiteness in the validation of testamentary transfers. At the same time, it questions the legal resistance to nontraditional families, which substantially weakens the aspirational theory of donative freedom—the cornerstone of Trusts & Estates. Through the intersection of wills law and family law, this Article initiates a critical inquiry of the influence of race in testamentary transfers.*

# THE COLOR OF TESTAMENTARY FREEDOM

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## INTRODUCTION

Death is a tragedy, but its aftermath can be a drama. Will contests over race, sexuality, and legitimacy unearth silent judgments[1] about the meaning of family[2] and the expectations[3] created in kinship, which incites a legal articulation of the color of testamentary freedom. Families mourn the decedent, and if the will jettisons normative ideas and expectations about family and kinship[4], the collateral heirs may contest the estate envisioned by the testator as the last will and testament. Selective attention paid to the testator's intent reveals a paradoxical contingency of testamentary freedom, that core legal tenet of "do what he wills with his own."[5]

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* Assistant Professor of Law, Syracuse University College of Law. I would like to thank Don Herzog and Anita Allen for their thorough comments, and to various faculty colloquia and conferences at New York Law School, Seton Hall University, and the Syracuse University College of Law Junior Faculty Forum. A heartfelt thanks to Sonia Katyal for her perspicacity and professionalism, and Anita Krishnakumar, Josh Tate, Rose Villazor, and Melynda Price. Parts of this research could not have been completed without the help of the O'Neill family of Charleston, the Avery Center for African American History and Culture, and the Charleston Historical Society. Special thank you to Rachel Godsil and Annette Gordon-Reed for their elegant insight.

[1] For a through discussion of lawsuits over dispositions considered "unjust" or "unnatural," see Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth Century America*, 119 HARV. L. REV. 960 (2006) (hereinafter BLUMENTHAL).

[2] James Hugo Johnston accumulated a number of these family disputes from the antebellum era in his book, RACE RELATIONS IN VIRGINIA AND MISCEGENATION IN THE SOUTH, 1776-1860 (1970).

[3] Testamentary disagreements are recorded as early as Blackstone, who argued that biological children received no automatic bounty in their parents' estate. 2 WILLIAM BLACKSTONE, COMMENTARIES ("The right of inheritance, or deficient to the children and relations of the deceased, feems to have been allowed much earlier than the right of devifing by teftament. We are apt to conceive at firft view that it has nature on it's fide; yet we often miftake for nature what we find eftablifhed by long and inveterate cuftom.")

[4] Modern courts have strayed from basing family court decisions, namely custody battles, on private biases. *See,* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (ruling that private biases and the possible injury they might inflict are impermissible considerations for removal of a white child from the custody of its natural mother who remarried a man of a different race).

[5] *See,* BLUMENTHAL at 963 (characterizing testamentary freedom as part of the Scottish Common Sense tradition)

Courts join in this jurisprudential melody that celebrates the American ideological duet of liberty and freedom, yet statuses of race[6], sexuality[7], and marriage[8] potentially curtail this posthumous wish.[9] Historically, representations of testamentary diversity—the after-death interests of nontraditional "family" over the unnamed interests of collateral heirs test courts' dedication to observing the unorthodox wishes of testators. Concomitantly, transfers with white, legitimate devisees as the objects of testamentary intent routinely passed. When pitted against an issue of a moral or social transgression[10], testamentary intent fails.[11]

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[6] *See generally*, R. A. Lenhardt. *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839, 843 (2008) (arguing that state-imposed obstacles to marriage have affected citizen rights) Florence Wagman Roisman, *The Impact of the Civil Rights Act of 1866 on Racially Discriminatory Donative Transfers*, 53 ALA. L. REV. 463 (2002) (exploring the effect of the 1866 Civil Rights Act to donative transfers). See also, Estate of Monks, 48 Cal. App. 2d 603 (Cal. App. 1941) (declaring surviving spouse as ineligible to inherit because interracial marriage was void); Succession of Filhiol, 119 La. 998 (La. 1907) (voiding interracial transfer as against public policy).

[7] *See*, In re Estate of Cooper, 187 A.D.2d 128 (1993) (rejecting the right of election against decedent's will in regards to same-sex marriage); In Re Kaufmann's Will, 205 N.E.2d 864 (1965) (claiming undue influence of gay life partner on testator). See also, Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1981).

[8] Trimble v. Gordon, 430 U.S. 762 (1977) (declaring unconstitutional an Illinois statute prohibiting a nonmarital child from inheriting from its biological father).

[9] Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. 84, 87 (1994) (calling for a change in inheritance laws to reflect the changing American family).

[10] *See,* BLUMENTHAL at 960. See also, Dees v. Metts, 17 So.2d 137 (Ala. 1944) (describing a white man who left property to a black woman as "sinful"). Wills involving same-sex partners also incite morality battles by disgruntled biological family members. *See also,* Amy Ronner, *Homophobia: In the Closet and in the Coffin,* 21 LAW & INEQ. J. 65, 73 (2003) ("the will contest becomes a device for righting the wrong, for ousting the villainous converter, and for reassembling the broken family")

[11] Courts have served as repositories of moral sentiment in regards to protecting disinherited family members. A number of scholars have addressed this issue with a call for more inclusive approaches to donative transfers. *See generally*, Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. 275 (1999) (championing "considers testator-compelled arbitration as a means for overcoming the Trier of fact's propensity to invalidate any estate plan that does not conform to majoritarian cultural norms"); Gary Spitko, *The Expressive Function of Succession Law*

This Article criticizes the doctrine of testamentary intent through an historical analysis of an antebellum interracial will contest as a paradigmatic example of the color of testamentary freedom. Other studies have explored the juridical anomalies of interracial will disputes, but have remained silent on the inherent pairing of wealth and whiteness in transfers of property.[12] Will transfers that cross color lines directly challenge donative freedom by asking courts to eschew social norms in favor of the testator's intent. Testators who eschewed traditional devises to spouses, relatives, and institutions in favor of mistresses, slaves[13], or both often incited will contests that succeeded in overturning their deviant will.[14] Building upon Cheryl Harris's concept of racialized expectancies in property theory, my research shows that white collateral heirs, in both a first and last resort, leveraged whiteness to contest wills that consciously excluded them.[15] In the eyes of the state, probating an interracial will that requests an acknowledgement of forbidden love[16] and its

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*and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1999) (considering the merits of same-sex inclusion within intestacy law); Melanie Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996) (examining courts' employment of moral values in wills law) (hereinafter "LESLIE"); Al Brophy, *Teaching the Race of Testamentary Freedom* (unpublished paper on file with author, 2005) (addressing the effects of gender and race on testamentary freedom).

[12] See Jason Gillmer, *Suing For Freedom: Interracial Sex, Slave Law, and Racial Identity in the Post-Revolutionary and Antebellum South,* 82 N.C.L. Rev. 535, 597 (2004) (addressing the rights of mixed-race slaves who sued for their freedom). See also, Bernie Jones, *Righteous Fathers," "Vulnerable Old Men," and "Degraded Creatures": Southern Justices on Miscegenation in the Antebellum Will Contest*, 40 TULSA L. REV. 699 (2005) (using interracial will contests to analyze the attitudes of antebellum jurists towards interracialism).

[13] *Id.*

[14] BLUMENTHAL at 964.

[15] Adrienne Davis, *The Private Law of Race and Sex: An Antebellum Perspective,* 51 STAN. L. REV. 221, 264 (1999) (hereinafter DAVIS) (describing will challenges initiated by white collateral heirs).

[16] Mary Boykin Chesnut's diary reveals the conflict between public oblivion and private knowledge of the interracial sexuality of the slave system:

> God forgive us, but ours is a monstrous system and wrong and iniquity....Like the patriarchs of old our men live all in one house with their wives and their concubines, and the mulattoes one sees in every family exactly resemble the white children - and every lady tells you who is the father of all the mulatto children in everybody's household, but those in her own she seems to think drop from the clouds…

DAVIS, *supra* note 15 at fn 286.

outcomes not only diminishes the authority of the law, but it also contradicts statutory intent.[17] State-sanctioned racial supremacy generates no surprises in the antebellum South, but its overwhelming persistence in blatant opposition to the language of the will clearly illustrates the central and tragic fallacy of testamentary intent.[18]

A surprising gap in the legal literature demonstrates a failure to contemplate race in wills as a presumptive indicator of family membership.[19] While studies have separately examined the myth of testamentary freedom[20], testamentary incapacity in interracial transfers[21] and the legitimacy of diverse families[22], scholars have paid less attention to the triangulation of race, marriage, and property as indices of the legal parameters of kinship. This Article sharply denounces the expectation interest[23] created by these norms that facilitate the provenance of racial supremacy and marital privilege to exclude nontraditional family forms. Statutory schemes remain underinclusive[24], as they may not provide legal protection for those infinitely diverse articulations of family and association[25] that exist beyond the comprehension and acceptance of the law.[26] By determining who stands eligible to inherit, wills law constructs a property interest in legitimacy that inherently discredits, discounts, and ultimately exposes the success of testamentary intent as contingent on social conformity.[27]

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[17] Gillmer, infra note 87 at 39.

[18] See LESLIE, *supra* note 11 at 236 (refuting the "oft-repeated axiom that testamentary freedom is the polestar of wills law").

[19] Professor Blumenthal has also written on deviance in wills, particularly interracial transfers of property. Her article differs because it focuses more on the psychological aspects of wills law than the limits of testamentary freedom).

[20] See generally, LESLIE.

[21] *See generally,* BLUMENTHAL.

[22] *See generally,* Spitko, *supra* note 11.

[23] HARRIS at 1729-31.

[24] JENS BECKERT, INHERITED WEALTH 111 (2007) ("The internal diversification of the model of the conjugal family.")

[25] See note 13.

[26] See *supra* note 11.

[27] The status of family can outweigh the actual nature of relationships. Blood ties, however remote, may trump the interest of a long-term, live-in, but nonmarital domestic partner who is not a legal spouse. Frances Foster, *The Family Paradigm Of Inheritance Law*, 80 N.C.L. REV. 199 (2001) (explaining that "family paradigm prizes status above need, desert, or affection").

This Article turns to history in order to examine the direct link between property, race, and sex. The records for this case remained untouched in Charleston, South Carolina, for 137 years.[28] The records include motions, opinions, and personal correspondence—all written by hand in calligraphic style. I focus on an interracial will dispute in South Carolina that straddled the end of the Civil War and the closing of the slave regime. In this case, white collateral heirs contested the will of their brother, Paul Durbin Remley, who had devised his estate to his slave mistress and their two children. In this same devise, the testator disinherited his white relatives, exercising his belief in testamentary freedom. By thinking of this mixed-race family as "deviant," the white, legally legitimate Remleys, in clear opposition to the donative intent, reap the benefits of the color of testamentary freedom.

This historical account of an interracial will dispute retains timeless value in its demonstration of the conflict of testamentary freedom and race. Section One discusses the inherent testamentary privilege of whiteness. By looking at antimiscegenation law as a deterrent for the interracial transmission of property, the state's support of a normative idea of the family becomes clear. A presumption of illegitimacy existed for interracial families, which sharply curtailed the survivor's rights to inherit. In the following section, I introduce the case of Mary Remley, a white widow accused of being a black slave. In the challenge to this claim, which threatened her children's inheritance of their father's will, an unintended relative asserts her status as a free white woman. This will contest not only demonstrates the legal power of whiteness, but it also underscores that privilege by resisting erroneous assaults on racial identity. This allows whites to exclude the legal expectancies and pecuniary interests of other whites, as long as their whiteness remains valid. The last Section looks at the younger Remley son's bequest to a black slave and their two children. In this conflict, race shifts from a disqualifier to an indicator of the limits of family. Finally, I conclude that racial and familial constructions that defy social norms challenge the aspirational concept of testamentary freedom, which ultimately reveals an inherent weakness in the cornerstone of wills law.

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[28] South Carolina Historical Society, Charleston, SC, Paul Remley Estate Case Records, 1861-1867.

## I. Inherent Privilege

Will contests force an intersectional analysis of family law and secession law by forcing private issues of deviance into the public realm.[29] In constructing laws to protect kinfolk from unjust disinheritance by testators, these safeguards reflexively exclude parties who fall outside the juridical conception of family.[30] On one hand, statutory schemes protect vulnerable family members from predictable patterns of disinheritance[31] that disfavor neglected spouses[32] and nonmarital, nonbiological children.[33] Spouses may not disinherit each other[34], and in most states, nonmarital children[35] have the same rights as marital children.[36] At the same time, these protections may completely contradict the testamentary intent of the decedent by directing property away from intended devisees into the

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[29] BLUMENTHAL at 966.

[30] Intestacy statutes approximate what the decedent would have wanted in the absence of a will. These statutory constructions of family prioritize biological over chosen family. NANCY POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 186 (2008). *See also,* Susan Gary, *Adapting Intestacy Laws to Changing Families,* 18 Law & Ineq. J. 1 (2000) ("intestacy laws still reflect the nuclear family norm").

[31] Blood relations are deemed so important by courts that distant relatives can have stronger claims over a decedent's estate than a domestic partner. The specter of the "laughing heir" looms large as a preventative doctrine, yet these testamentary safeguards baselessly privilege biological family over chosen family, which allows collateral heirs to reap the benefits of legal legitimacy. The Uniform Probate Code has taken measures to limit the scope of succession, which prohibits inheritance beyond grandparents and their descendants. UPC §2-103. See also David F. Cavers, *Change in the American Family and the "Laughing Heir,"* 20 IOWA L. REV. 203, 208 (1935) (predicting the change in law).

[32] The Uniform Probate Code allows for spouses who were left out of a premarital will to recover the same amount as an intestate share, with some exceptions. UPC §2-301. Additionally, all spouses displeased with their share in a will may opt for an elective share, depending on the length of the marriage. UPC §2-202.

[33] Trimble v. Gordon, 430 U.S. 762 (1977).

[34] Forty nine states (except Georgia) give the surviving spouse some right in the estate of the decedent. UPC §2-221.

[35] However, adopted children have the same testamentary rights as biological children. *See,* Susan Gary, *Adapting Intestacy Laws to Changing Families,* 18 LAW & INEQ. J. 1 (2000) (examining rights of adopted children); Jan E. Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why?,* 37 VAND. L. REV. 711 (1984) (examining treatment of adopted children in succession laws).

[36] *Supra* note 8.

hands of "approved," legally legitimate family that the decedent entirely wished to circumvent.[37] This presumption favoring legitimacy entirely devalues the cornerstone of wills law, testamentary intent, by imposing an unwanted statutory construction of family[38] that eclipses the decedent's subjective definition which deviates from the state's and society's norms of kinship.[39]

The idea of the "changing American family"[40] perpetually fluctuates, with the only constant aspect being the law's recognition of a limited version.[41] Marriage has long stood as the unifying characteristic of family, yet this venerable institution has been subject to state control.[42] Concomitant with regulation of marriage is the regulation of property transmission, and stringent controls on who

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[37] At common law, courts went to extreme lengths to ascertain blood relatives of persons who died intestate. In a 1953 Philadelphia case involving a $17,000,000 estate, 26,000 potential heirs asserted claims to the estate. The court opined, "some persons still sincerely believe that they are entitled to her estate as next of kin and cannot understand how any Court can fail to recognize their close relationship to their dear and treasured Henrietta whom they never saw or knew but of whom they have recently become so fond." In re Garrett's Estate, 94 A.2d 357, 358-9 (Pa. 1953) (*cited in* Frances Foster, *The Family Paradigm of Family Law*, 80 N.C.L. REV. 199, n217 (2001).

[38] The meaning of "family" in wills law offers a presumption strongly in favor of the nuclear family. Beneficiaries outside this protected circle must rebut this presumption in order to inherit. See Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1999) (citing Professor Fellow's argument that intestacy law favors the nuclear family).

[39] *Id.* Ralph Brashier offers a comprehensive examination of diverse families and the problems they face with inheritance. *See*, R. BRASHIER, INHERITANCE LAW AND THE EVOLVING FAMILY (2004).

[40] A number of scholars have engaged this term to describe the challenge of law to embrace difference rather than imposing uniformity and penalizing diversity. See Foster, *Family Paradigm* at 201; Gary, *Adapting Intestacy Laws* at 4, 58. One scholar argues that modern families have eclipsed the specter of 1950's nuclear television families. Thomas Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 58.

[41] *See,* ANITA BERNSTEIN, MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS (2005).

[42] Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967) (recognizing that marriage is subject to State police power, but not unlimited); Cleveland v. U.S. 329 U.S. 14 (1946) (regulation of marriage is a state matter); *See,* DAVIS *infra* note 15 at fn15. *See also,* MILTON REGAN, JR., ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE (1999).

can get married necessarily dictates, in turn, who may inherit.[43] Regulation has prevented people of the same sex[44] from legal consolidation of their interests, as well as interracial couples,[45] related people,[46] minors,[47] and slaves.[48] Relationships that fit the state's conception of appropriate prospective spouses receive state protection of their relationship and of their property.[49] For those relationships existing outside of this realm of approval, securing these same rights proves a remarkably difficult process.[50]

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[43] *See generally*, Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) (hereinafter HARRIS) (arguing that property is a form of racialized privilege).

[44] Today, gay and lesbian partners, in addition to heterosexual nonmarital partners, must overcome a presumption of nonaffiliation to decedents who die intestate. David Chambers, *What If: The Legal Consequences of Marriage and the Legal Needs of lesbian and Gay Male Couples,* 95 MICH. L. REV. 447 (1996) (discussing the rights of gays and lesbians under intestacy laws).

[45] Loving v. Virginia, 388 US 1 (1967) (holding unconstitutional a state statue prohibiting interracial marriages). Despite the Supreme Court's 1967 ruling, Alabama formally held on to antimiscegenation law until the year 2000. Kevin Johnson, *Taking The "Garbage" Out in Tulia, Texas: The Taboo on Black-White Romance and Racial Profiling in the "War on Drugs",* 2007 WIS. L. REV. 283, 300 (2007) (citing Alabama's statute as an example of the lingering taboo of interracial relations).

[46] Singh v. Singh, 213 Conn. 637 (1990) (voiding a marriage between a half-uncle and a half-niece).

[47] Moe V. Dinkins 533 F.Supp 623 (1982). See also, Lynn Wardle, *Rethinking Marital Age Restrictions*, 21 J. FAM. L. 1 (1983).

[48] *See,* DAVIS, *infra* note 15 at fn 9. Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 330-31 (1996) (summarizing effects of enslavement on inheritance).

[49] *See,* Brashier, *supra* note 39 at 3. For the majority of people who die without a will, the laws of intestacy approximate the decedent's presumed intent, which fails to incorporate diverse family structures. Ronald Scalise Jr., *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 172 (2006). ("intestacy laws are important because they embody the collective judgment of a society as to how an individual's property should devolve in the absence of an expression by the decedent").

[50] Upholding community standards and social norms in blatant conflict with testamentary intent not only institutionalizes and rewards discrimination in wills law, but it also unfairly discourages settlors to provide for their chosen family. Testators who eschewed traditional devises to spouses, relatives, and institutions in favor of mistresses, slaves, or both often incited will contests of testamentary incapacity, undue influence, or fraud. BLUMENTHAL at 964. Professor Foster has argued for the intangible benefits of wills, which include sentimental recognition of the survivor's importance to the decedent. Frances Foster, *The Family Paradigm Of Inheritance Law*, 80 N.C.L. REV. 199 (2001) (arguing that maintaining ownership and

Testamentary language indeed articulates a decedent's subjective interpretation of family, but nontraditional estate plans may confront a restrictive statutory scheme that bases kinship on traditional legal and social expectations.[51] In most cases, wills pass quickly though probate because few challenges exist to slow and lengthen the probate process. Few legal barriers prevent a civil spouse and children from being considered as legitimate family members.[52] It is the rarer and more diverse conceptions of family that must overcome a presumption of illegitimacy[53], even when the words of the testamentary document clearly indicate the familial role played by the disenfranchised.[54] Despite the clarity of intent, balancing the state's interest in the efficient distribution of property with the testator's legal interest in bequeathing directly challenges the efficient meaning of "family." This reveals an under examined aspect of not only the privileged status gained from marriage, but also the governmental regulation of diverse expressions of family.[55] Married people's relationships receive state protection, while deviant families suffer in the disruptive wake of unfounded testamentary entitlement. The collision of these interests clearly highlights the

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connection to the decedent's property "ensure[s] a continued connection with a deceased loved one."). Additionally, Professor Spitko has noted that testamentary freedom encourages testators to freely distribute property, Spitko, Conforming, *supra* note 11.

[51] LESLIE at 238 (discussing courts' commitment to seeing that testators uphold a duty to family.)

[52] *See,* Jennifer Tulin McGrath, *The Ethical Responsibilities of Estate Planning Attorneys in the Representation of Non-Traditional Couples*, 27 SEATTLE U. L. REV. 75, (2003) (explaining the legal formation of traditional, nuclear, heterosexual families); Foster, *infra* note 27 at n2 (pointing out the mythical stereotype of the traditional nuclear family). *See also,* Spitko, Nonmarital, *supra* note 7 at 1102 (stating that intestacy law reflects societal understandings of family which privileges heterosexual marriage).

[53] Kevin Noble Maillard, *The Multiracial Epiphany*, 76 FORDHAM L. REV. 2709 (2008) (describing the default legal and social approach of illegitimacy and/or improbability of interracial families and relationships).

[54] LESLIE at 236.

[55] Diverse expressions of family—unmarried heterosexual couples and also homosexual couples—find that their expressions of commitment fail to receive the same easy protections of the heteronormative nuclear family. See Laura Rosenbury, *Two Ways to End a Marriage: Divorce or Death,* 2005 UTAH L. REV. 1227 (2005) (exploring inheritance law as an example of state's views on marriage and gender roles).

difference between statutory constructions of family and heirship and the subjective representations articulated by the decedent.[56]

[56] This concept describes the ability of testators to direct behavior after their death by setting requirements on devisees in order to inherit. *See,* Shapira v. Union Nat. Bank, *315 N.E.2d 825*, 827-28 (Ohio Com.Pl. 1974).

A. (Il)legitimacy Explained

Testamentary freedom hinges upon the racial identity of the beneficiary. Common law dictates eligibility to inherit by declaring heirs as either legitimate or illegitimate.[57] A legitimate heir stands as a biological descendant, born to married parents, and held out by the decedent as his child, thus placing the descendant within a protected class of devisees.[58] Children born within state sanctioned conjugal relationships[59] rest upon the legal privilege conferred by their parents' marriage.[60] Conversely, a child born to unmarried parents held the status of illegitimate and was not legally recognized as the decedent's natural child.[61] This exclusion from legal protection not only demonstrates a preference for married households, but it also refuses to define family outside of a nuclear, male-female, marital dyad. Legal access to the decedent's estate—and the strength of that claim—increased according to the state's conception of the approved family.

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[57] Blackstone characterizes bastardy, or illegitimacy, as a child without "inheritable blood." This status came from the child having parents not married at the time of his/her birth. Blackstone's Commentaries http://www.yale.edu/lawweb/avalon/blackstone/bk2ch15.htm ("are such children as are not born either in lawful wedlock, or within a competent time after it's determination").

[58] JENS BECKERT, INHERITED WEALTH (2007).

[59] Conjugal relationships normally signify marriage, although same-sex and different-sex cohabitants are also included. Canada has taken steps to expand the meaning of family "beyond" conjugality to include adults living alone, sibling pairings, and platonic cohabitating adults. *See,* Law Commission of Canada, Beyond Conjugality Report (2001), *available at* http://www.samesexmarriage.ca/docs/beyond_conjugality.pdf.

[60] Intestacy law upholding the exclusion of illegitimate children if there are martial children has been deemed constitutional. *Id.* At 106.

[61] In wills law, preventative measures dictate minimum requirements for estate distribution, despite testamentary intent. LESLIE at 269 (elective share statutes, which curtail "the decedent's testamentary freedom with respect to his or her title-based ownership interests... No matter what the decedent's intent.") The inheritance interests of legitimate family members traditionally trumped those of enumerated illegitimate counterparts, although modern reforms have given nonmarital children additional rights. Beckert, *supra* note 24 at 105. Yet traditionally, law created a hierarchy of testamentary interests that did not interpret devises to nonmarital children as viable transfers of property. *Id.* at 104.

Children and partners living within non-nuclear, nonmarital households have traditionally fallen short of the benchmark of protection in comparison to legally legitimate parties who already enjoy the security of the law. In the wake of protecting legitimate family members, those outside this sphere of recognized kinship remain vulnerable to being divested of their legal rights.[62] Indeed, legitimacy has its merits by protecting survivors of the decedent from disinheritance and pecuniary neglect.[63] Intestacy and elective shares ensure that spouses and children retain a state-sanctioned share of the decedent's estate.[64] These protective schemes also have a preventative efficacy by ensuring that external parties have no greater claims on the estate than do the legitimate family.[65]

For those who could not marry, legitimacy remained an elusive status that excluded all nontraditional couples and families. States with antimiscegenation laws did not entertain the legal possibility of an interracial family.[66] And all states, until recently[67] did not recognize same sex marriages.[68] In both of these exclusions, race and sexuality intersect to pose *legitimate* questions about the fiction of testamentary freedom.[69] If adhesions to "legitimacy" supersede the wishes of the testator, external norms of family construction and kinship eclipse any subjective posthumous wish to

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[62] Spitko, *supra* note 11 at 1098.

[63] Foster, *supra* note 50 at n84 (citing Via v. Putnam, 656 So. 2d 460, 466 (Fla. 1995)).

[64] *Id.*

[65] *Id.*

[66] Maillard, *supra* note 39 at 2712. DAVIS at 231, 268.

[67] California and Massachusetts grant same-sex couples the right to marry. New York recognizes same sex marriages performed outside of New York. In re Marriage Cases, 183 P.3d 384 (Cal. 2008) (holding that limiting marriage to heterosexual couples denied gay couples of equal protection); Martinez v. County of Monroe, 850 N.Y.S.2d 740 (N.Y. App. Div. 2008) (recognizing all forms of foreign marriage, including same sex); Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003) (granting same-sex couples equal rights to marriage as provided in the state constitution). Vermont, New Jersey, Connecticut, and New Hampshire have granted same-sex couples the same right as different-sex married couples, but these legal unions have not been classified as "marriage." Baker v. State, 170 Vt. 194; 744 A.2d 864 (Vt. 1999); Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

[68] *Id.*

[69] LESLIE at 236. ("the oft-repeated axiom that testamentary freedom is the polestar of wills law").

provide for an intended[70] rather than (or in addition to) a legal family. Testamentary freedom is heavily contingent on legal permissiveness rather than the actual, biological, or conjugal relationship between decedent and devisee. In order to confer rights on the relation, a legally recognized relationship must exist. Law, as a filer of efficiency[71], selectively casts its legitimizing gaze.

B. Racializing Legitimacy

Antimiscegenation statutes curtailed the transfer of property across racial lines. By declaring marriages between blacks and whites illegal, law thwarted a secure interest of black and mulatto beneficiaries in the estates of white testators. Without the protective status that marriage confers, courts viewed interracial families as inherently illegitimate, which opened estates to the rapacious strategies of white collateral heirs. The reliability of antimiscegenist amnesia, that is, the narrative that the interracial family does not legally exist, fueled the redirection of testamentary intent. With the law favoring coverage of legitimate kin over illegitimate relations, white collaterals expected courts to supplant the beneficiaries' named interests in favor of themselves. The racial identity of the beneficiaries stimulated traditional grounds for objecting to a will: incapacity, undue influence, and fraud.[72]

Miscegenation existed as a public secret in each of the slave states. The legal derecognition of formal interracial relationships belies the reality of their widespread existence. In his comprehensive study on American mulattoes, Joel Williamson comments, "it is safe to assume that the lines of lust in the old South ran continually and in all directions." The concubinage of black women by white men formed the majority of interracial relations, although unions between black men and white women were not unknown.[73] A northern

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[70] Tanya K. Hernandez, *The Property of Death,* 60 U. PITT. L. REV. 971, 1014 (1999) ("state legislatures can go even further in functionally recognizing families of choice).

[71] Bruce Mann, *Formalities and Formalism in the Uniform Probate Code,* 142 U. PA. L. REV. 1033 (1994) (debating the social utilities of probate efficiency).

[72] BLUMENTHAL at 961.

[73] Although this aspect of miscegenation deserves mention, it goes beyond the scope of this project. For a comprehensive examination of this nexus of race and gender, see MARTHA HODES, WHITE WOMEN, BLACK MEN, *infra* note 138. I am primarily concerned with the darkening of wealth, that is, mulatto inheritance from

traveler in South Carolina commented, "The enjoyment of a Negro or mulatto woman is spoken of as quite a common thing; no reluctance, delicacy, or shame is made about the matter."[74] Despite individual and cultural narratives asserting such liaisons through informed channels, state marriage laws upheld rigid distinctions between racial groups.[75]

Not all states prohibited interracial marriage.[76] In the deep South, South Carolina did not prohibit interracial marriage until after the Civil War and in Charleston occasional marriages occurred between persons of color and well-regarded whites.[77] The state suspended the prohibition in 1868, only to reenact it in 1879.[78] Although *Loving v. Virginia*[79] rendered all antimiscegenation laws unconstitutional, the state retained the law in its books until 1999.[80]

Antebellum miscegenation confounds our collective understanding of racial boundaries and sexual desire. Close proximity of blacks and whites in shared spaces[81] during and immediately after the slave era facilitated sexual availability.[82] Yet

white kin, which concerns the transfer of property from white men to mixed race offspring. *See also* ROBERT J. SICKELS, RACE, MARRIAGE, AND LAW 16-19 (Albuquerque 1972) (explaining sexual stereotypes of black men and white women).

74 WINTHROP JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, 145 (1968).

75 State statutes, such as in Alabama, upheld boundaries between black and white in an attempt to segregate "the most fundamental unit of society, the family." Julie Novkov, *Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890—1934*, 20 Law & Hist. Rev. 225, 226 (2002)

76 For an interactive map detailing which states restricted interracial couples from 1662-1967, see http://www.lovingday.org/map.htm.

77 *See*, JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES 16 (1995) ("South Carolina was unique among the British mainland colonies not only in its blackness and easy mixing but also in that some whites positively and publicly defended interracial sex.")

78 *See* RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 75-6 (2003); PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY 103-4 (2002).

79 388 U.S. 1 (1967).

80 S.C. Const. Ann. Art. III, 33 (2003).

81 *See,* JOHN MICHAEL VLATCH, BACK OF THE BIG HOUSE: THE ARCHITECTURE OF PLANTATION SLAVERY 1-17 (1993).

82 *See,* WILLIAMSON, *supra* note 70 at 15 ("The great number of slaves gave abundant sexual opportunity to white masters and overseers.")

within these connected physical worlds, strict hierarchies existed to maintain racial roles and boundaries.[83] Jeffersonian perceptions of racial difference[84] articulated a public disgust for the "oorang-ootans"[85] of the African race, thus equating interracial sex as a form of bestiality between free white humans and enslaved black animals.[86] In dehumanizing blacks as simple mammals incapable of sentience, talent, and memory, men leveraged their status as free and white to exploit and violate black women.[87] This version of history survives as the collective understanding of miscegenation: forced, asymmetrical, and purely physical.

On the other hand, a growing body of literature espouses the possibility of an alternative narrative for interracial sex[88], which

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[83] See, RACHEL MORAN, INTERRACIAL INTIMACY 23 (2001) ("interracial relationships were tolerated only insofar as they left norms of racial and sexual privilege intact").

[84] In *Notes on the State of Virginia*, Jefferson wrote at length on his "aversion…to the mixture of colour in America." *See,* WINTHROP JORDAN, WHITE OVER BLACK 467 (1968). Despite his own personal involvement with a mulatto slave, Sally Hemings, Jefferson wrote at length about preferring Indian-white intermixture over black-white intermixture, which he viewed as a different interaction of species.

> Are not the fine mixtures of red and white, the expressions of every passion by greater or less suffusions of colour in the one, preferable to that eternal monotony, which reigns in the countenances, that immoveable veil of black which covers all the emotions of the other race? Add to these, flowing hair, a more elegant symmetry of form, their own judgment in favour of the whites, declared by their preference of them, as uniformly as is the preference of the Oranootan for the black women over those of his own species.

THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA.

[85] *Id.*

[86] *Id.*

[87] See DEBORAH GRAY WHITE, "AR'N'T I A WOMAN?" FEMALE SLAVES IN THE PLANTATION SOUTH 29-46 (rev. ed. 1999) (1985), *quoted in* Jason Gillmer, *Base Wretches And Black Wenches: A Story Of Sex And Race, Violence And Compassion, During Slavery Times*, 59 ALA. L. REV. __ (2008).

[88] Interracial relations between free white men and enslaved black women generate a host of reactions addressing the nature and/or possibility of consent. Many scholars would argue that slave status precludes any form of consent and a loving relationship, thus making all liaisons between free men and slave women rape. Others may view the relationships as mutually beneficial, with black women acceding to these relationships in search of better futures for themselves and their children. Analyzing the consensual possibilities of these relationships goes beyond

allows for recognition of diverse racial family forms in the South.[89] Jason Gillmer argues for a more historicized look at interracial sex and families from this area, which exposes the complexity and nuance of navigating interracial relationships and families in the context of African slavery.[90] Similar to the case study in this Article, Gillmer examines an interracial family in Texas besieged by claims of illegitimacy despite the thirty-year relationship between a white master and his slave. By examining both the legal and social narratives that surround the marital-like relationship between the interracial couple, Gillmer juxtaposes the inherent racial inequality of the slave system with the possibility of romantic attraction between the races.[91] Eliciting this unique but not uncommon case of antebellum interracial attraction reveals the practical intricacies of human interaction in relation to the legal system that presumed its implausibility.[92]

The greatest intellectual untility derived from Gillmer's work is the ability to let history tell the story of lived experiences in relation to the law.[93] In the context of miscegenation, it is a legal fiction to say that interracial sex is prohibited and void, but the more difficult

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the scope of this article, but I do believe it would be overinclusive and anachronistic to forestall a possibility of mutual interracial attraction. *See,* DAVIS, *supra* note 15 at n10 (citing Eugene Genovese's analysis of master-slave relationships beginning as exploitation and turning into love).

[89] *See generally*, ANNETTE GORDON-REED, THE HEMINGSES OF MONTICELLO (2008); JEFF FORRET, RACE RELATIONS AT THE MARGINS: SLAVES AND POOR WHITES IN THE ANTEBELLUM COUNTRYSIDE (2006); CALUDIA SAUNT, BLACK, WHITE, INDIAN: RACE AND THE UNMASKING OF AN INDIAN FAMILY (2005); CHARLES ROBINSON, DANGEROUS LIAISONS, SEX AND LOVE IN THE SEGREGATED SOUTH (2003).

[90] Gillmer, *supra* note 81 at 5.

[91] *Id.* at 35.

[92] Local studies of interracial families tell a different story of black-white sexuality and romance that confound legal prohibitions against miscegenation. Close examinations of individual families reveal stories of mutual intimacies between master and slave that give a more complete picture of interracial relations. These historical portraits reveal and give life to the conflict between everyday experience and legal regulation. *See,* JOSHUA ROTHMAN, NOTORIOUS IN THE NEIGHBORHOOD: SEX AND FAMILIES ACROSS THE COLOR LINE IN VIRGINIA, 1787-1861 (2003); KENT ANDERSON LESLIE, WOMAN OF COLOR, DAUGHTER OF PRIVILEGE (Athens, GA, 1995); ADELE LOGAN ALEXANDER, AMBIGUOUS LIVES; FREE WOMEN OF COLOR IN RURAL GEORGIA 1789-1879 (1993).

[93] Gillmer, *supra* note 81 at 5.

project is assessing the continuing occurrence of these deviations in direct opposition to a legal culture that virtually guaranteed their illegitimacy.[94] Prohibiting marriage between black and white created legal obstructions for formal recognition of these relationships, but it did not eradicate the liaisons that occurred outside the legal realm. Sex between master and slave went largely unpunished, and in the eyes of the law, unrecorded.[95] Yet, in the examination of local histories, racial rhetoric and separationist doctrine implodes by opening a "window into the consciousness of ordinary people."[96]

Perceiving interracial relationships as illegitimate and implausible stems from a legal history that privileges the interests of free whites over those of black slaves. In cases of interracial conflict, whites relied on the exclusion of blacks, both slave and free, to secure and solidify their own legal interests. Cheryl Harris's landmark work on the social and legal benefits of racial discrimination uncovers the "settled expectations of whites built on the privileges and benefits produced by white supremacy."[97] Both Harris's and Gillmer's work address the nature of privilege, but while Gillmer analyzes the problem from a grassroots level, Harris depicts a legal system inherently skewed toward forwarding the interests of whites. At this macro-level, she forces a reconsideration of unequal racial assumptions of property. Her critical approach to the unquestioned racial assumptions of property law forces a necessary reconsideration of aperspectivity.

For Harris, property inherently upholds tenets of racial supremacy.[98] Starting with a basic premise of ownership—the dialectic of possession and exclusion—she constructs a theoretical framework that captures the interests, both vested and anticipated, from owning property.[99] Property defines social relations[100] and

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[94] Almost all states had legal prohibitions against interracial marriage. See Maillard, *The Multiracial Epiphany*, *supra* note 53.

[95] Angela Onwuachi-Wilig, *A Beautiful Lie: Exploring Rhinelander v. Rhinelander as a Formative Lesson on Race, Identity, Marriage, and Family*, 95 CALIF. L. REV. 2393 (2007) (citing Rachel Moran, INTERRACIAL INTIMACY) *("*"Sex across the color line was commonplace despite its racially ambiguous consequences. White men enjoyed ready and open access to black and mulatto women as a mark of their untrammeled freedom and privilege.").

[96] Gillmer, *supra* note 81 at 5.

[97] Harris at 281.

[98] *Id.* at 1731.

[99] *Id.*

creates expectations both tangible and intangible.[101] Being white itself reflected an identity that signified one's status in law and social practice. While "white" marked one as inherently free and unsaved, "black" denoted one as being subject to enslavement.[102] White racial identity and the privileged position that it inhabits invokes a property interest with expectations that "could not be permissibly intruded upon without consent."[103] The ability to hold and possess property, rather that being its subject, demonstrates the crucial aspect of racialized property interests; the absence of blackness allowed for an unencumbered legal existence.[104] Even after the slavery regime had fallen, people of African descent continued to feel the legal echoes of slave status.

This Article takes up where Harris stops. By taking seriously her claim that whiteness is property, it is possible to see property interests and racial privilege merge without subtlety in testamentary disputes. As Harris explains the expectation interest inherent in property theory, whiteness "retain[s] its essential exclusionary character…and distort[s] outcomes of legal disputes." White collateral heirs meant for disinheritance by the testor jumped upon the opportunity to leverage their racial identity against beneficiaries of color. As both a first and a last resort, whiteness kept property within the "proper" family while serving as a trump card to defeat interracial transfers. From this assumption of entitlement emerges a triangulation of race, sex, and property that underscored the implicit association of whiteness and legitimacy.

## II. Race as a Marker of Testamentary Eligibility

Paul Remley, a free white man, died in Charleston in November of 1860.[105] He left his widow, Mary Remley, a farm in Pennsylvania consisting of "19.5 acres of poor land but healthy with

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[100] *Id.* at 1728.

[101] Harris argues that "property is a legal construct by which selected private interests are protected and upheld." *Id. at* 1730.

[102] *Ida* 1718.

[103] *Ida* 1731.

[104] *Ida* 1721.

[105] Account of Paul Remley's Estate in Pennsylvania, Paul Remley Estate Case Records, 0308.02 (R) 01, South Carolina Historical Association (hereinafter "RCSCHS")

two small storm houses on it, no farm buildings, one old shed."[106] He appointed his son, Paul Durbin Remley ("Durbin") as administrator of the estate, and the younger Remley assumed charge on December 1, 1860.[107] In the following summer of 1861, Durbin filed for a grant of administration of his father's will. In this capacity, he was expected to share the profits of the estate with his siblings: Elizabeth Hubbell (née Remley) and Emma Remley. At this time, the siblings lived in different parts of the country, with Durbin residing in Charleston and the sisters in Pennsylvania.

The conflict within this family fluidly illustrates how external pressures simultaneously threaten and bolster their legitimacy as a family. In two separate will contests involving the father Paul's will and the younger son Durbin's will, the racial identity of the beneficiaries determined the outcome. Depending on the angle, law acts both to exclude and include, and the legitimacy of heirship turns on a secure claim to whiteness. For those actors who were able to claim a legal identity as white, they employed law to restrict the economic benefits of family membership to exclude those who could not.

## A. Slavery and Testation

### 1. Strategic Accusations of Slavery

A conflict arose when Durbin applied for the grant on June 3, 1861—the same day that a challenger questioned his legitimacy as an administrator. Mary Shrine, claiming to be his second cousin, filed a complaint in a Charleston Court of Ordinary alleging herself to be a legitimate next of kin.[108] Durbin and his sisters, she alleged, were rendered ineligible due to the status of their mother. Mrs. Shrine filed an affidavit which argued that "the supposed widow of Paul Remley is a colored person" and that "she was purchased by said Paul Remley as a slave."[109] Shrine attempted to position herself as having not only a superior claim on the estate, but as the only legitimate heir to the Remley estate. If she proved the widow Mary

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[106] *Id.*

[107] Letter from William Hubbell (Aug 8, 1866) (RCSCHS) (hereinafter "W. HUBBELL, AUG. 8").

[108] In the matter of Estate Paul Remley Dec'd (18 June 1861) (RCSCHS).

[109] *Id.*

as a slave, then the Remley children would follow her diminished status; Paul, Elizabeth, and Emma would immediately become slaves[110], and ineligible to stand as legal heirs.[111] Shrine, remaining as the nearest kin eligible to inherit (i.e. free and white), could overcome the articulated testatementary interests of Paul Remley's children and widow.[112]

The taint of slavery as the kryptonite of testation could render any "white" heir ineligible. Mary Shrine based her argument on South Carolina's 1841 *Act to Prevent the Emancipation of Slaves*.[113] This Act prohibited testamentary emancipations, and it also voided all bequests to slaves. Section IV reads, "That every devise or bequest, to a slave or slaves, or to any person, upon a trust or confidence, secret or expressed, for the benefit of any slave or slaves, shall be null and void."[114] Even if the Remleys had considered themselves free white persons, the possibility of a hidden condition of their mother threatened their ability to inherit their father's estate.

2. Defending Whiteness

The accusation of diminished legal and racial status, however farfetched, generated a flurry of representations of Remley family

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[110] Legal definitions of children's status throughout the South followed Roman law by declaring *partus sequitur ventrem*—that children followed the condition of the mother. Wikramanayake, *supra* note

[111] A number of fictional books appealed to this white fear—of sudden and unexpected relegation to slavery. In his meticulous book on mulatto imagery in Victorian fiction, ROBERT MENCKE, MULATTOES AND RACE MIXTURE 198 (1979) explains, "what threat could be more dire than that of the blood of the inferior races of the world secretly slipping into that of the mighty civilizing race of Anglo-Saxons?" Examples of such books are REBECCA HARDING DAVIS, WAITING FOR THE VERDICT (1867); ALBION TOURGEE, PACTOLUS PRIME (1890); WILLIAM DEAN HOWELLS, AN IMPERATIVE DUTY (1892); .

[112] It must be pointed out, however, that race did not serve as a constant determinant of status. For children with parents of different races, the mother could be black or mulatto and pass her free status to her child. Likewise, children of black or mulatto slave fathers and free white women, while very few in number, retained free status, despite their father's condition. EUGENE GENOVESE, ROLL JORDAN ROLL (1976).

[113] *Act to Prevent the Emancipation of Slaves, and for Other Purposes* (1841), quoted in Joliffe v. Fanning & Phillips, 31 S.C. Eq. (10 Rich.Eq.) 186, 190 (1856); *See also* DAVIS, *supra* note 15 at 251.

[114] *Id.*

history. The competing claims to the status of Mary Remley, who offered no voice in the available correspondence, demonstrate a flurry of legal panic in the race to reassert the primacy of whiteness and freedom. If the Remley children followed the condition of their mother, not only would they lose testamentary and legal standing, but also their public reputations as free white persons.

In an effort to bolster their legitimacy, the Remleys offered testimony from "respectable" white persons to verify their freedom and race. These narrative contributions necessarily referred to the past, offering a subjective view of Mary Remley's standing in the community. These acts of remembering had legal and practical relevance, but they also reasserted the Remley family as white, privileged citizens. In reconstructing their racial identity by means of community opinion, the family followed a well-established precedent. Whether these claims were made public outside the protection of the court remains unknown, but the singular assertion and multiple refutations as documented in the legal records commemorate a type of juridical discussion of sexual and racial privacy that was routinely relegated beyond the scope of public discourse.

The Remley "defendants," like any party in litigation, selectively remembered advantageous facts and omitted pejorative ones. Soon after the supposed cousin filed the accusatory affidavit in the Court of Ordinary, the Remley party called upon Sam Wagner, a free white man and a churchgoing citizen of Charleston, to verify Mrs. Remley's whiteness. As a member of Bethel Methodist Church, Mr. Wagner testified that Mr. and Mrs. Remley were "always recognized as white persons in the use of all the privileges of the Church"[115] He continues by attesting to their status as "acceptable members" and active "Class Leaders." Unmentioned in this written testimony are references to miscegenation or slavery. Mr. Wagner's narrative limits itself to public interpretations of racial identity. As expected, he makes no mention of Mrs. Remley's questionable origins, focusing instead on Mr. Remley's secure status as a free white man and Mrs. Remley's white father. Additionally, he remains silent on the Church's significant black and mulatto

[115] Affidavit of Sam Wagner (June 27, 1861) (RCSCHS).

members, who at that time constituted the majority of Charleston's black Methodists, approximately 6,000 in number.[116]

Characterizing the allegation as a "question of Pedigree and legitimacy,"[117] the Court of Ordinary postponed the decision of grant in order to accommodate the contestant Mrs. Shrine by allocating one week for her to provide corroborating testimony. When she failed to prove the slavery claim, the Court found Durbin legally competent to administer his father's estate. In the absence of supporting evidence from Mrs. Shrine regarding the truth of her accusation, Wagner's sole opposing affidavit proved sufficient to defeat the objection to Durbin's grant of administration. The Court qualified this ruling, however, by distinguishing legitimacy for administration from legitimacy for distribution. Noting that the possible truth of Shrine's claim would not greatly affect the pending grant, the Court added "altho it may become so in a progress of settlement of assets of said Estate."[118]

Legally, the Court's finding voided the issue, but the family continued to discuss the "great annoyance and mortification."[119] In correspondence and memoranda, Elizabeth Hubbell continued to refute the claims of race and slavery, writing from Philadelphia to her brother Durbin "a very long epistle" chronicling their family's history of respectability and whiteness.[120] Mrs. Hubbell's pride prevents her from explicitly addressing the assault to her family's racial identity, telling her brother that "the astonishment the thing has occasioned may be better imagined than described."[121] To her knowledge, their father was "not the man to lower himself by such a degrading act as is alleged."[122] She viewed these charges as a "conspiracy" organized by "low people" who unjustifiably wanted to deprive the Remley children of their inheritance. In desperation, Hubbell expressed her conviction that the "whole thing [was] gotten up by some of [Durbin's] enemies," notwithstanding the

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116 EDWARD LILLY ED., HISTORIC CHURCHES OF CHARLESTON 43-44 (Charleston, 1966).

117 In Court of Ordinary (June 29, 1861) (RCSCHS).

118 *Id.*

119 Letter from Elizabeth Hubbell to Paul D. Remley (July 7, 1861) (RCSCHS) (hereinafter "E. HUBBELL LETTER").

120 *Id.*

121 *Id.*

122 *Id.*

"[un]intelligent" Mrs. Shrine whose "Mother was subject to some sort of fits."[123]

B. Reconstructing Whiteness

Elizabeth Hubbell takes an adversarial stance in her letters, which makes these documents a source of critical interpretation. In writing she expressed her racial frustrations, while advocating her biased conception of her family's racial identity. Looking backward to the past for explanation, she draws upon unquestioned relationships to justify her own self-identity and that of her mother. She becomes the architect of her family's history by realigning the past to justify her present needs. Even if Hubbell's labor of remembering finds ground in unstable sources, she appropriates a verisimilitude to her past that may be at odds with historical truths.[124] In this battle of competing whitenesses, each party expects their legal rights to follow the privileged condition of their racial identity.

Three primary examples of lived whiteness form her grounds for remembering her family as white. First, she recalls that her mother was registered at the multiracial Bethel Methodist Church in Charleston as a "free white person," a demonstrative fact which she interprets as conclusive proof.[125] "[H]ad there been any doubt of the fact," she writes, "I imagine her name *could* not have been *entered there*."[126] Second, her mother's wedding to her father at Bethel serves as proof of their supposedly irreproachable whiteness. She maintains that her mother's bridesmaids were "ladies of respectability" who would not be "intimate with a person of doubtful pretensions." Her

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[123] *Id.*

[124] *See generally,* W. FITZHUGH BRUNDAGE ED., WHERE THESE MEMORIES GROW: HISTORY, MEMORY AND SOUTHERN IDENTITY 5 (Chapel Hill, 2000).

[125] Her reliance on the church's record of its members does not account for the possibility of errors in representation, similar to simple and learned mistakes of census takers. Oftentimes, census takers and other keepers of official records make erroneous estimates of a person's race, thus recording some African-Americans of fair complexion as "white." In sole reliance upon these subjective measures of record-keeping for posterity, genealogists, historians, and other scholars may draw fatuous conclusions that have substantial effects on contemporary interpretations of racial identity. For an insightful interpretation of this problem, see Kennedy, *supra* note 78 at 1-12 (chronicling the events of *Green v. City of New Orleans*).

[126] E. HUBBELL LETTER, *supra* note 119.

logic assumes an if/then calculation that makes reputation a barometer of racial identity: "If she had been purchased and held as a slave all these things could not have been."[127] Lastly, she turns to her mother's parentage and upbringing, noting that her mother's mother was an orphan, "brought up by strangers."[128] Her mother's father, of Jacksonboro, South Carolina, "was of a respectable family, scarcely likely to intermarry with a low person."[129] In each of these specious arguments, Elizabeth blindly accepts a tautology of race and reputation that equates "respectability" with whiteness and freedom and "doubtful pretensions" with blackness and slavery.[130]

Elizabeth's letter to her brother assumed a candid tone, revealing potentially shameful family intimacies. She did not intend for it to be used in a court of law—rather she vented her personal frustrations into a written narrative that memorializes her shock,

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[127] *ID.*

[128] Elizabeth Hubbell's husband William rushed to his wife's defense by composing a memorandum to his attorney that traced the ancestry of his wife's mother. William Hubbell, Memorandum for James B. Campbell Esq. In the Matter of the Estate of Paul Remley, Deceased, on behalf of his widow Mary Remley & Children, written in 1861, but not sent "on account of hostilities preventing." (document not shared until November 9, 1886) (RCSCHS) (hereinafter "W. HUBBELL MEMO". He too employed an equation of race and reputation to dismiss Shrine's claims. Polite white persons marry and consort with persons like themselves. Mrs. Remley married a decent white man, and kept company with proper white Charlestonians. Therefore, Mrs. Remley must be white. He fortifies this logic with genealogical information about her parents Thomas and Leah Whitley, offering additional evidence to his wife's rendition. Thomas Whitley, he argues, came from an English family of "respectable noble descent," which he attests to be listed in *Burke's Peerage of Landed Gentry*. *See generally* BURKE'S GENEALOGICAL AND HERALDIC HISTORY OF THE LANDED GENTRY (L.G. Pine ed. 1952) Leah, on the other hand, he portrays as a daughter of a fallen soldier of the Revolutionary War and a woman of unknown origins. Remarkably, he does not question any deeper meaning or possibility of "unknown." Still, this liaison of high and low, noble and plebian produced "an exemplary moral and Christian woman" who with her husband, operated a well-known grocery store in Charleston.

[129] E. HUBBELL LETTER, *supra* note 119.

[130] William Hubbell (spouse of Elizabeth) offers a radically different explanation for Mrs. Remley's alleged status. He surmises that a love triangle spawned the accusation of Mary Remley's mother as a "colored slave." Apparently, Leah Whitley jilted Joseph Mitchell, who in turn married Mary Mitchell, the informant. W. HUBBELL, AUG. 8, *supra* note 107. Embittered by a prolonged two years of rejection, Mitchell maliciously told others that Leah was a "colored slave."

pain, and disbelief in the fragility of her racial identity. Both Elizabeth and her husband William created lively renditions of the Remley past in order to protect their testamentary legitimacy. It seems that Mrs. Shrine's claim never penetrated the veil of believability for either the Court or the Remleys, but her farfetched claim provides an illuminating script to analyze the use of race as a qualifier of standing for inheritance.[131] It also demonstrates the extent that courts would entertain such a testimony in patent opposition to the elder Remley's intent. Freedom of testation would fail in the event of a legitimate claim of slavery. Knowing this, Mrs. Shrine floated on the presumption of the incompatibility of blackness and exclusion.

[131] Harris at 1741; Jones, *supra* note 31 at 701.

## III. Race and the Limits of Family

The authority to contest a will directly relates to one's status within the law. Those who enjoy the legal privileges of property—in this case, the security of whiteness, enter a will contest on the offensive. The younger Paul Remley (Durbin), disinherited his white family in Pennsylvania upon his death in 1863, devising his South Carolina estate to a black woman and their two children. In this subsequent case, the Pennsylvania family assumed the role of white collateral heirs, in sharp contrast to their role as besieged and presumed slaves. At this point, they became unassaibly white. Although Durbin's choice of family became quite apparent in his will, the South Carolina Equity Court resisted recognition of this nonmarital, interracial unit. Again, freedom of testation hinged on the racial identity of the beneficiaries. The Hubbell-Remleys, as legitimate and white collateral heirs, challenged the will which acknowledged interracial sexuality. Durbin's nontraditional devises did not convince the court that probating the will was morally justifiable.[132]

Apparently, Durbin lived a quiet life as a wealthy planter in the Carolina Lowcountry. Few, if any, texts of state history record his name as a prominent figure in Southern politics, agricultural affairs, or Charleston society. At the time he applied to administer his father's will in 1861, he lived on a plantation known as Remley's Point in the Charleston District. On this 305 acre plot situated in Christ Church Parish at the junction of the Cooper and Wando Rivers,[133] Paul D. Remley lived with his slave Philis[134] and their two

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[132] LESLIE at 236.

[133] Historical Overview of the 4th Avenue Tract, Remleys Point. (on file with the Avery Research Center for African American Culture, College of Charleston).

[134] No official bill of purchase exists for the slave Philis, but census records loosely provide an understanding of who she was. The 1870 census lists both her and Cecile as "black" rather than "mulatto," so we may assume that Philis and her daughter were of sufficiently dark complexion as to lead the census taker to classify them as of unmixed blood. In 1861, she would have been approximately 18 years old, the mother of a seven-year old son Charles, and pregnant with her daughter Cecile. The 1870 federal census lists Philis, black, as 27 years old, and Cecile, black, as seven. However, litigation documents in 1866 verify Cecile being five years old. These records would also make her a mother at age 12. (on file with the Charleston County Public Library, South Carolina History and Genealogy Section).

children. Durbin also owned a brick house and lot[135] on Society Street in downtown Charleston, which was a common practice for wealthy planters in the Carolina Lowcountry.[136] State records show that he bought and sold slaves fairly regularly.[137]

Interracial sex and cohabitation existed in the antebellum South within unspoken codes of behavior. Durbin could maintain Philis and their children at his plantation with impunity because her slave status eviscerated any claim of legitimacy on their sexual relationship. As the slave mistress of Paul D. Remley, she tacitly assumed the role of wife and paramour, as he remained unmarried throughout his life. As the mother of his only two children, Philis claimed a distinct role at Remley's Point. Nominally a slave but almost a wife, she assumed an ambiguous role of partner and servant not unknown to women of color in the antebellum South.[138] Even though South Carolina law allowed for interracial marriage[139], it applied to free blacks only, thus preventing the legal legitimization of miscegenous relationships between master and slave. Slavery precluded any legally recognized relationships, thus securing the

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[135] He also owned two uninhabited lots in Charleston. *See* Plan Showing 16 Town Lots On Anson, Society, East Bay And Wentworth Streets, Surveyed By Charles Parker, Series L10005, Reel 0001, Plat 00493 (on file with South Carolina Dept. of Archives and History).

[136] *See generally* EUGENE GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 427 (New York, 1976) (discussing Charleston's development as a cosmopolitan center for the plantation aristocracy).

[137] *See* George Henry to Paul Remley, Bill of Sale For a Slave Named Amey, Series S213003, Vol. 005D, p. 0001 (Sept 9, 1820) (on file with the South Carolina Dept. of Archives and History); Paul Remley To Thomas Buller King of St. Simons Island, Ga., Bill of Sale For a Slave Named Limehouse, by Trade a Bricklayer, Series S213003, Vol. 005K, p. 00314 (Nov. 17, 1830) (on file with the South Carolina Dept. of Archives and History)

[138] The question of emotion and intimacy in interracial relations in the South, particularly between white men and black slave women, has received great attention in many disciplines, with no agreement on how to characterize them. I certainly do not intend to address that contentious issue, seeing that it goes beyond the scope of this project. Other scholars, however, offer meticulous historical studies. *See generally* JOSHUA ROTHMAN, NOTORIOUS IN THE NEIGHBORHOOD: SEX AND FAMILIES ACROSS THE COLOR LINE IN VIRGINIA, 1787-1861 (Chapel Hill, 2003); F. JAMES DAVIS, WHO IS BLACK: ONE NATION'S DEFINITION (Pennsylvania State University, 2001); MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH-CENTURY SOUTH (New Haven, 1999); GENOVESE, supra note 136.

[139] *See, supra* note

sexual freedom of white men. Furthermore, Durbin and Philis did not challenge what Adrienne Davis has termed the Southern "sexual economy"[140] by formally affirming their relationship with the state. In this choice, Durbin faithfully believed that recorded word would suffice in the distribution of his estate.

Testator appreciation for wills—their ritual, the solemnity, the gravity—incorrectly assumes that death solidifies intended posthumous transfers, thus following the common law aspiration of freedom of testation.[141] This doctrine would doggedly argue for the careful distribution of property as the decedent saw fit, in accordance with a validly drawn, witnessed, and executed will.[142] Far too often, courts and collateral heirs ignore testamentary language to reformulate a will that more closely conforms to state-mandated schemes of distribution. The color of testamentary freedom defeats donative intent to reapportion the estate for the unintended benefit of related, but clearly undesirable heirs.

A. "Die and endow, a college or a cat"

Yet Durbin would show his appreciation for this relationship upon his death. He died on December 25, 1863 while hunting, which Philis describes in a letter as "the discharge of his Gun by shooting marsh hens in company with Major Bolks and John Antley the ball entered his lungs of which he survived 13 days after being shot[.]"[143] In his will, he provided for his slave-widow and their children an annuity of $500 per year, to be paid from the sales of his property both real and personal.[144] He also bequeathed "his Negroes," meaning Philis, Charles, and Cecile, to a friend "to have the labor and services of the said slaves and their issue for and during his natural life."[145] Durbin did not intend to relegate his family to a state of abject slavery, but to place them "under the control of kind and indulgent owners, who will, whenever the law permits manumit and make them free."[146]

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[140] DAVIS, *supra* note 15 at 228.

[141] Leslie at 235 ("Courts and scholars often treat freedom of testation as if it were a fundamental tenet of our liberal legal tradition.")

[142] *Id.* at 345.

[143] Letter from Philis to Elizabeth Hubbell (June 1, 1865) (RCSCHS).

[144] Paul D. Remley Will, Remley's Point Collection, available at Avery Research Center for African American History and Culture, College of Charleston.

[145] *Id.*

[146] *Id.*

South Carolina courts frequently tried such issues. In *Fable & Franks v. Brown*, a white man established a trust in his will for his two "illegitimate coloured children by a female slave."[147] The plaintiffs, claiming to be the next of kin of the testator, objected to the will, claiming that such bequests to slaves were invalid. On appeal, the court approved the bequest on its face, upholding the testator's wishes. As a caveat, however, the court compared the man's will to the freedom of providing posthumous support for a favorite pet or object, saying, "Die and endow, a college or a cat."[148] Even though the court validated the will, the property reverted to the state, because slaves, as property, could not inherit.

Durbin's scheme differs, however, because of timing, thus allowing circumvention of the legal prohibition on slave bequests and manumissions. He did not leave his property to his slave family directly, but to an administrator to carry out his wishes. In this testamentary trust, his family would receive the interest resulting from the state of his personal property that he could not leave to them directly because they were slaves.[149] Additionally, he did not manumit the slaves in his will, but he allowed for its possibility in the future, but at the time of probate, this issue was moot. Had the will been executed while Phillis and the children remained slaves, the court may have followed *Fable*.

Durbin's semantics of slavery in his will deserves further scrutiny. Although Philis argues that she and her children had been emancipated by the time he wrote his will, he nevertheless referred to them as though they were slaves. Had he left them property directly, he would have placed their interests in jeopardy considering that the 1841 prohibition on slave bequests had yet to be overturned.[150]

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[147] *Fable & Franks v. Brown*, 10 S.C. Eq. (1 Hill Eq.) 378, 379 (1835).

[148] *Id.* at 397.

[149] *See supra* note 113.

[150] The clause reads,

Be it enacted, by the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That any bequest, deed of trust, or conveyance, intended to take effect after the death of the owner, whereby the removal of any slave or slaves, without the limits of this State, is secured or intended, with a view to the emancipation of such slave or slaves, shall be utterly void and of no effect, to the extent of such provision; and every such slave so bequeathed, or otherwise settled or conveyed, shall become assets in the hands of any executor or administrator, and be subject to the payment of debts, or to

Additionally, he did not free them in the will, but he expressed the hope that their new owners would manumit them "whenever the law permits."[151] Although the Emancipation Proclamation affected many states, it did not necessarily free all slaves in South Carolina, and all slaves, regardless of residence, were freed by the 13th Amendment in 1865.[152] In referring to them as slaves, Durbin captures a memory of them as favored and faithful servants instead of beloved and deserving family members. In this move, he formally maintains distance between himself and Philis, thus underscoring a Southern code of racial propriety.

Durbin's goodwill toward his black family makes a strong statement as to his parental allegiances. Although he does not acknowledge his children as his blood, his testamentary wishes clearly state his economic concerns for his family, and he memorializes his intimacy with Philis in a legal document that leaves little room for alternative explanations. He expressed a desire to sell his property "to be appropriated for the use, clothing and comfort in sickness and health" for her and the children.[153] In this document, he rejects the interests of his collateral white heirs, which he noticeably refrains from mentioning until the end of the will. In this devise, he leaves his residual estate to his mother Mary Remley, and upon her death to his sister Emma. In no place in the will does he mention his sister Elizabeth Hubbell.

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distribution amongst the distributees or next of kin, or to escheat, as though no such will or other conveyance had been made.

*See supra* note 113.

151 Paul D. Remley Will, *supra* note 144.

152 At the time of Durbin's death, President Lincoln had issued the Emancipation Proclamation, which declared that "all persons held as slaves…shall be then, thenceforward, and forever free[.]" ABRAHAM LINCOLN, Emancipation Proclamation (January 1, 1863) in 6 COLLECTED WORKS OF ABRAHAM LINCOLN 28-31 (Roy P. Basler ed., 1953). This decree most likely did not change Philis's slave status, as South Carolina remained a rebellious state that resisted actual emancipation until the physical arrival of Union troops. LARRY KOGER, BLACK SLAVEOWNERS: FREE BLACK SLAVEMASTERS IN SOUTH CAROLINA, 1790-1860 190 (1985). The possibility of the exceptional change in her status would have entangled Durbin's will in a problematic archaism—he made provisions for slave succession after emancipation and these promises found no political or legal grounding. Possibly freed, but indicated as slaves in the will, Durbin's legacy to Philis, Charles, and Cecile, as a post-emancipation testament, made itself vulnerable to attack.

153 *Id.*

Durbin disinherited his sisters because he found their opinions of his family objectionable. Elizabeth's previous letter regarding their mother's racial identity revealed strong disapproval of race mixing, which she described as "degrading" and "low." In finding a subject to channel her frustrations and convictions, she demonstrates her disapproval of miscegenation to her brother without explicit mention of his own transgressions.

The Remley case stands apart from other interracial inheritance cases because of the prevalent influence of the Civil War. Durbin's will remained untouched for three years after his death, which coincides with the war's end. Presumably, hostilities between the Union and the Confederacy deterred not only the rapid administration of wills, but also communications between North and South. Correspondence amongst multiregional families such as the Remley's dissipated to such an extent that years passed without hearing news from relatives in distant places. This case is no exception, and postwar letters circulated amongst the family demonstrate delayed notifications of salient events. In the period between Durbin's death and the subsequent litigation, the transformations of war raise this standard yet mildly transgressive postmortem distribution to a juridical exercise of reconstructing the past.

Correspondence from Charleston completes the cycle of belated information about uncommunicated family episodes. As proxy for Durbin, Philis responds to the sisters on June 1, 1865, with her own tragic news of Durbin's death. In this response, she conveys a sense of loneliness, despair, and depression. Philis's letter sparks a chain of events that leads to the eventual dispute over inheritance. In this correspondence, she conveys an intimacy with Durbin that alludes to mutual intimacy. A full two years after his death, she recalls:

> My Dear Mistress the morning of which he died was Christmas on that Morning he Called me to wash him saying that he felt so much better and said that he did not think that his mother was alive and was Desirous of seeing his sisters also he said on the Morning that Christmas Morning was a Mourning Day to the Family which after he called on me to give Him the Bible to read of which I did & said that

> he was thankful to God for his Mercies towards Him to spare his life to see that happy Morning[.][154]

This candid vignette shows intimacy between Durbin and Philis that she relays without hesitation to his two white sisters. Philis nevertheless remains deferential and observant in her writing by repeatedly referring to Durbin as "My Dear Master," but she also conveys her attachment to him by eventually admitting "you do not know how it destroyed me" and that "I truly Miss him."[155] At the close of her letter, she pleads for the sisters to return to Charleston "to relieve [her] Distressing mind" and to "find a Friend." The exercise of recalling her beloved's death renewed the pain she once felt, as she laments, "I would say more but by heart ache me to think of the past or look at the present."[156]

B. Race-ing to a Will Contest

Durbin's will serves as intriguing memoranda of a socially averted yet physically manifested chapter of slaveholding society. Yet this case turns that silence on its head. *In re Remley* does not stand alone by any means—other cases in South Carolina exemplify the not uncommon practice of miscegenation and concomitant testamentary expressions of compassion.[157] The law's resistance to testatementary diversity demonstrates the existence of a "problem" that could not be avoided. The transfer of property and wealth from white to black memorializes the testator's preference to designate these goods in the interests of his mixed race family. This deliberate act of prioritizing the economic interests of his black family invites a public postmortem discussion of miscegenation that in his lifetime, remained purely private. In this act, he calls upon law to investigate,

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[154] Letter from Philis, *supra* note 143.

[155] *Id.*

[156] *Id.*

[157] *See also Somers v. Smyth*. 2 S.C. Eq. (2 Des. Eq.) 214 (1803); *Miller v. Mitchell*, 8 S.C. Eq. (Bail. Eq.) 428 (1831); *Fable and Franks v. Brown*, 10 S.C. Eq. (1 Hill Eq.) 290 (1835); *Farr v. Thompson*, 25 S.C. Eq. (4 Rich.Eq.) 37 (1839); *Carmile v. Carmile* 16 S.C. Eq. (McMul. Eq.) 635 (1842); *Monk v. Pinckney*, 30 S.C. Eq. (9 Rich.Eq.) 279 (1857); *Dougherty v. Executors of Doughtery*, 21 S.C. Eq. (2 Strob. Eq.) 63 (1848); *Ford, Escheator v. Dangerfield*, 29 S.C. Eq. (8 Rich.Eq.) 95 (1856); *Jolliffe v. Fanning & Phillips*, 31 S.C.Eq. (10 Rich.Eq.) 186 (1856).

affirm, and sustain the legitimacy of his subjective articulation of family. Yet, within a racial regime that prioritized propriety over deviance, the question of whose interests are served challenges the lofty theory of testatmentary freedom.

Counsel for the Hubbell's contended that the will intended to spite Elizabeth and her mother by "putting the Negroes over" their interests.[158] In this contest, the sisters objected to the will on three primary grounds: 1) that testamentary transfers to slaves were invalid; 2) that Durbin appropriated his father's estate for his own use and enjoyment; and 3) that the postwar devaluation of Durbin's estate deprived them of any interest in his property.

1. The Slavery Claim

The intention to establish a trust for Philis and the children immediately drew the attention of the Hubbell's, who viewed them not as eligible parties for a testamentary transfer, but as bonded persons precluded from exercising legal and economic interests.[159] A bill of complaint opposing Philis's interest described the bequest as "contrary to Equity and good conscience."[160] This rebuttal draws upon a conception of the past that eternally equates blackness with slavery. Even though Durbin wrote his will after Lincoln's emancipation of Philis and the children, common sense would dictate that the Hubbell's' slavery claim found no legitimate ground. Still, Elizabeth and her husband persisted to contest Durbin's intent to provide for and support his chosen family; they saw not a family but a gang of slaves that threatened their free and racialized interest in his estate.

Their focus on the slave status of Philis and her children demonstrates the Hubbell's' racially motivated objections, and they rely on race privilege as a persuasive method for denying the validity of the will. They do not deny the existence of the miscegenous relationship, as their correspondence demonstrates this knowledge. Because they did not directly attack Philis and her children's racial status as impediments to inheritance, the slavery argument displaces this expected rebuttal by fixating on their former lives as slaves. Presumably, the Hubbell's realized the weakness of this objection to

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[158] Unsigned memo to Messrs. Ledyard and Boulon (Nov 9, 1866) (RCSCHS).
[159] *Id.*
[160] Ziba B. Oakes Bill of Complaint (Nov. 9, 1866) (RCSCHS).

the will, seeing that its postwar execution and contestation dates made the slavery issue almost moot. Only under Confederate law could this claim have succeeded.

Philis readily responded to this fatuous claim by asserting her rights gained as a free woman. In her answer to the Hubbell's' complaint, she insisted upon the validity of the will, emphasizing its creation after her manumission. Arguing for its possible validity under the regime of slavery, she emphasized that "having been actually emancipated and made free before the distribution of the estate of Paul D. Remley such bequest should be held good and valid."[161] On the strength of this claim, she succeeded in establishing her ability to inherit property.

2. Whether Durbin's "Appropriation" was Proper

Competing conceptions of the past reemerge in the interpretation of "property" of the elder Paul Remley's estate. As stated above, the Hubbell's maintained that Philis and her children were ineligible to inherit as slaves, but they expanded this argument by also asserting that the slaves existed as part of the elder Remley's estate. In this line of thought, their father's death entitled them to a share in the slave property, which they argued that Durbin "appropriated them to his own use and purposes."[162] They expected Durbin, once appointed as administrator of the estate, to convert the father's personal property into money and divide the proceeds equally amongst the heirs. Of this personal property, which William Hubbell estimated at $36,000, Elizabeth, Emma, and Durbin would each receive $12,000.[163]

In the interest of securing a share in Durbin's estate, the Hubbell's appropriated the meaning of chattel slavery. Here, they did not view Philis as a long-term acquaintance or fellow heir, but as merchandise which Durbin mishandled in the administration of his father's estate. Philis shifts from an article of property to an

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[161] Separate answer of Philis a freed woman, South Carolina District Court, In Equity (Dec. 28, 1866) (RCSCHS).

[162] W. HUBBELL LETTER, *supra* note 107 .

[163] Hubbell catalogues the personal property as: "about 30 negroes value $25 K and personal property on the farm: value $4K; Cotton $2K. He cut wood also which he had no right to do, a thousand or more cords: value $3K; Insurance stock $2K. [TOTAL] $36K." *Id.*

obstruction of right, one that displaces their expectation to inheritance.[164] In other words, Durbin's enumeration of Philis as a beneficiary rather than a parcel reduces the total value of the money they argued belonged to them.

> He says they are his slaves and then dispenses of their services as his own property to another person, exclusive of the other heirs—"expressis imicis alterias exclusis." If they as he says are taken as his and dispenses of by him as his then he excludes the other heirs and they can claim for value received by him.[165]

Philis, they believed, was not exclusively Durbin's. Even though he called them "my negroes Philis and her children,"[166] the Hubbells claimed they were theirs as well. This way of remembering the past, although legally motivated, aims to diminish the status of Philis as a rightful beneficiary. Even by invoking her monetary value, they cannot reasonably relegate her to slave status, but they can insist on recovering this money to aggrandize a greater share than Durbin had allotted. Thus, in describing Philis as an object of property rather than its recipient, the white collateral heirs seek financial security through a shrewd manipulation of the past.

3. The Devaluation of Durbin's Estate

The value of Durbin's estate directly relates to the outcome of the Civil War. He wrote his will after the war began, taking into account the then-current value of his property. At that time, he considered his estate valuable enough to yield $500 a year for the comfort and clothing of Philis and her children. Alternatively, he authorized his trustee James Gray to pay them the amount in full "if in his judgment he shall deem it judicious and proper."[167] This estimate of his finances and holdings predated the fall of the Confederacy and the collapse of its economy. Durbin remained aware of the possible effects of the war, as he directed his executors to invest his money conservatively to safeguard his postmortem worth throughout the war. He entrusted them to invest in "safe

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[164] HARRIS at 1740, 1758.
[165] W. HUBBELL LETTER, *supra* note 107.
[166] Paul D. Remley Will, *supra* note 144.
[167] *Id.*

Securities, or real estate…until the declaration of peace between these Confederate States and the United States[.]"[168]

Durbin's antebellum legacy to his black family, which would not take effect until after the war, makes an intriguing study of the influences of history on memory. At once, the document encompasses three modes of temporality: past, present, and future, each intervening to construct, commemorate, and sustain posterity of interracial wealth marked by the mercurial economy of the embattled South. When he wrote his will he remembered his property as he could only imagine—the economic upheaval of the agrarian based political system which supplied his wealth superseded his testamentary objectives. As much as he tried to secure his property for Philis, he could not accurately account for the devaluation of his estate that would swallow his secondary bequests to his mother Mary and sister Emma. From his standpoint, the subversive act of enriching the economic lives of his black kin would transcend his death. In his own act of remembering and securing the past, he could not contemplate an unforeseen and unprecedented future.

The Civil War's effect on property values generated additional testimonies. His executor, Optimus Hughes, submitted an answer to the Equity Court that described the conditions of the estate in the aftermath of the Civil War. Returning to Charleston after serving in the Confederate Army, Hughes found his papers and accounts destroyed. He recalled the poor economic climate, saying that "everybody was oppressed with anxiety and great poverty scarcely knowing what to do to obtain food for their families."[169]

The disinherited Hubbells argued that the legacy to Philis and her children deprived them of their fair share in distribution. Objecting to the "fallacy of [Durbin's] expectations," they were not "willing to bear all the losses and give her the full measure of the legacy."[170] Here lies a problem of ademption as a result of interstate conflict. In an 1866 memorandum to their attorneys, the Hubbells contended:

> But as to Durbin's will it was made with the view that there would be no loss in the Estate—but under the Southern Confederacy would be valuable and that he

[168] *Id.*

[169] Separate answer of Optimus Hughes (Dec. 24, 1866) (RCSCHS).

[170] W. HUBBELL LETTER, *supra* note 107.

> could afford to give her $500 a year on 8,000 or so absolutely out of his share—and have much left.[171]

Their primary objection to Durbin's will focuses not only on the devaluation, then, but also his misappropriation of property to which they felt entitled. While the two sisters had moved north to Pennsylvania, Durbin remained in South Carolina, inhabiting the valuable plantation at Remley's Point and the other properties in Charleston. They believed that even if Durbin's will did not make them primary beneficiaries, they deserved a share in their father's estate, which they believed Durbin had hoarded for himself. If his executors sold this property to provide for Philis, she would take "their" property.

### C. Testamentary Drama

The performative aspect of will disputes surfaces in the courts, where competing conceptions of the past come forth. Three parties offer different versions of what the testator intended to bequeath to the heirs: First, the deceased party offers a written document as evidence of his intentions. In this testamentary language, he outlines desired plans for the estate after his death in the presence of witnesses that can attest to its veracity. Durbin, with three witnesses and an equal number of executors, constructed a plan to support his companion and their children beyond his death. Second, the named beneficiary offers a similar conception of the past, and she persists in proving the will as legal and valid. Philis insisted that Durbin, as the head of her household, earnestly intended for her entitlement to his estate. As an explicitly listed distributee, she offers the will itself as proof of his unquestionable design.[172] Lastly, the objectors to the will submit an alternative version of the true intention of the will, and they envision a radically different plan of distribution, which they argue as the appropriate version. According to each of these parties, their version of the past stands as correct.

But in litigation, multiple versions of the same story always exist. Without this conflict, the issue would become moot; unequal and unpleasant distributions would not occur, everyone would agree, and all would accede to a singular account of history. As argued by Paul Antze and Michael Lambek, interpretive conventions greatly

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[171] Unsigned memo to Messrs. Ledyard and Boulon, *supra* note 158.

[172] Separate Answer of Philis, *supra* note 161.

influence the types of actors and events that receive attention, and also the kinds of evidence accepted as testaments to the past.[173] The divisive and tumultuous factor of race institutes an additional narrative convention in recreating the past and viewing the family, and interracial conflicts aptly illustrate this interpretive diversity. In interracial inheritance disputes, the color of testamentary freedom often allowed collateral heirs to deny the existence of mixed race. In relying on a legal system that rewarded and prioritized the circumstance of whiteness, testators retained no assurance that their wishes would be carried out.[174]

This case effectively demonstrates the color of testamentary freedom, and the vested property interest of whiteness. First, Mary Shrine could have jeopardized the Remelys' ability to inherit from their father's estate if they were found to have African ancestry. Mrs. Shrine could have limited the definition of legitimate family to those persons who could prove themselves white. Secondly, Durbin's collateral heirs relied upon the racial privilege afforded them by law to deny Philis of a monetary legacy that would recognize and perhaps legitimate her own family. The likelihood of their surprise at the relationship between Durbin and Philis is low. Yet, the fictional barricade that facilitated white denial in the face of blatant knowledge acted to deny people of color from taking part in the benefits accorded to legally recognized family members.[175]

Durbin's siblings indeed objected to the interracial will, as they appealed to the Equity Court to "cut the Negroes out entirely."[176] They recognized that Durbin's bequest to his black family was "sufficient to take up the whole of his interest in his father's Estate and that there [was] nothing left for any other party."[177] By excluding his mistress and children, the sisters attempted to erase the recorded legacy that entitled former slaves, then current kin, to a share in Durbin's estate. William Hubbell wrote a letter advising his attorneys to "attack…the validity of the will itself" and to absorb all

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[173] PAUL ANTZE AND MICHAEL LAMBEK EDS., TENSE PAST xviii (London 1996).

[174] Often times, however, South Carolina courts observed the testator's wishes. *See generally supra* note 157.

[175] Edward Ball describes similar reluctances in his own family to recognize black kin descended from slaves once owned and sired by his family in South Carolina. See generally, EDWARD BALL, SLAVES IN THE FAMILY (1998); THE SWEET HELL INSIDE. (2001)

[176] W. HUBBELL LETTER, *supra* note 107.

[177] Ziba Oakes Bill of Complaint, *supra* note 160.

of Durbin's interest to "[leave] nothing for it to take effect upon."[178] Their objections to the will, in addition to procuring additional wealth for themselves, stem from their displeasure with Durbin's tenuous relationship with his white family. They complained that Durbin "never wrote to them, nor sent anything during the Rebellion" and that "he never sent them a dollar."[179] Additionally, "he did not even send his Mother money to pay his Father's funeral expenses."[180]

These letters of objection reveal a desire to reinvent a familial history devoid of the taint of miscegenation. Hubbell writes that they wish to "undo what has been done," explicitly rejecting the past that Durbin had memorialized in his will.[181] In denying the testator's death wishes, the collateral heirs recreate history in their own image, championing themselves as the legally and racially eligible distributees. Despite the fact that Durbin's wishes were recorded on paper and ratified by witnesses, the white tentative heirs retell a story of Durbin's ill health, arguing that his disabled condition from the gun wound led him to write an invalid will. Only "with a load of shot and wad in his lungs," they argue, could they rationalize Durbin's wishes to spite his family for a gaggle of slaves.[182] According to this line of thought, respectable white persons would not reasonably relinquish their property and wealth to bastards and Negroes.

Although the white collateral heirs' depiction of Durbin's infirmity and irresponsibility garnered sympathy from the Equity Court, they did not wholly attempt to derail Philis from her proper inheritance. But this nominal inclusion must not be confused with accepting her as a legitimate distributee. They recognized Philis not as part of Durbin's family, but as a servant to their father who deserved compensation "in consideration of her attention…in his sickness at the Point two or three years before his death."[183] Seeing themselves as the primary heirs rather than Philis and her children, the white heirs agreed to allot $2,000 "for her comfort, when she as

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[178] W. HUBBELL LETTER, *supra* note 107.
[179] *Id.*
[180] W. HUBBELL LETTER, *supra* note 107.
[181] *Id.*
[182] *Id.*
[183] *Id.*

things proceed proves worthy of it." [184] In stark contrast to Durbin's testamentary intent, Philis received a pittance while Elizabeth took the majority of his estate. The Equity Court Master approved this consolation scheme, recommending that "it be accepted as advantageous to [Philis]."[185]

## Conclusion

The conflict that instigated the Remley conflict escaped traditional legal methods of resolution. The complex nature of the case required special attention that the courts of the common law could not adequately provide. Due to the radical changes in the South's political, economic, and legal climate caused by the Civil War, pertinent law that directly and fairly addressed the postwar administration of an antebellum interracial will did not exist. Moreover, probate of the will, so soon after the war, yet four years after the testator's death, lingered in the postwar instability of South Carolina's legal system. Ademption of Durbin's estate hinged on whether or not Philis and the children could be considered a loss of "property" and also a misappropriation of the elder Remley's estate. Yet, no slave system existed at the time of probate to fund the estate. Thus, South Carolina's Equity Court heard the case because it did not fit into existing rules of law, administering a ruling with a heightened sensitivity to the individual interests of the parties.[186] This courtly invocation of empathy viewed the disinheritance of white heirs (in favor of black ones) as a viable application for equitable principles.

This case, which spans both antebellum and postwar regimes, forces an examination of public secrets being legally recognized. As Austin Sarat argues, "memory may be attached, or attach itself, to

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[184] In the end, Philis bore the brunt of Durbin's original will. Out of the $2,000 allotted to her, all debts and legal fees were deducted, and half of this amount was given to Optimus Hughes, the administrator. Thus, Philis received money, but she was required to pay the costs generated from the white heirs' objections. Order (August 12, 1867) (RCSCHS).

[185] Remley Case Masters Report (July 5, 1867) (RCSCHS).

[186] *See* Barry Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1263 (2002).

law and be preserved in and through law."[187] This method of constructing the past in relation to the juridical structures particular to a place and time works to legitimate and authorize an historical account of possibilities and improbabilities. This is a surprising result from a contemporary viewpoint. To imagine that a former slave's right to inheritance decreased after the Civil War confounds a modern understanding of historical memory. It is far easier to imagine Philis's chances of inheritance as secure after the war, but it is more difficult to interpret her diminishing rights after the domestic conflict that presumably attempted to enable them. Furthermore, to examine her shrinking interest in Durbin's estate in light of his testamentary wishes presents a peculiar definition of "equity." While this translates to an overt assertion of racial supremacy in objection to clear testamentary intent, it also demonstrates a shrewd manipulation of legal definitions of family. The Hubbells portray his effort as a wanton death desire of a country planter "with a load of shot and wad in his lungs."[188]

The claim of incapacity allows the collateral heirs to make legal sense of Durbin's unconventional assertion of a multiracial family in the antebellum and postwar South.[189] Yet, Durbin did not marry Philis, even though Philis was technically not a slave and state law permitted interracial marriages at the time of his death. Had he married her, his siblings would not have had legal grounds to contest the will, and the combination of her free status and her spousal protection would have enabled her to inherit without restriction. Yet, South Carolina law enabled the white heirs to succeed in their will challenge because the legal system upheld the restricted notion of a white, legitimate, recognized family—which did not include Philis and the children.

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[187] Austin Sarat & Thomas R. Kearns, *Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction*, *in* History, Memory, and the Law (Austin Sarat & Thomas R. Kearns eds., 1999) at 12.

[188] Unsigned memo to Messrs. Ledyard and Boulon, *supra* note 158.

[189] Contrary to amnesiatic legal histories, extralegal miscegenation did occur in the antebellum South, but whites carefully distinguished between *knowledge* and *acknowledgement*, with the former concerning gossip, and the latter concerning recognition. This crucial distinction illuminates the Southern dialectic of miscegenation: publicly, it affronts the race-based slavery regime, while privately, it provides pleasure and reinforces dominance. CHARLES FRANK ROBINSON II, DANGEROUS LIAISONS: SEX AND LOVE IN THE SEGREGATED SOUTH 13-14 (2003).

State law resisted the probate of Durbin's will as he intended. His testamentary objective was clear—he wanted to provide for Philis and the children, and leave his sister with nothing. The competing conceptions of family—his black one and his white one—find different treatments in South Carolina courts. Even though he made provisions for Philis's "use, clothing and comfort," he could not overcome the legal privilege accorded to free whites. His collateral heirs were able to capitalize upon the law's favoring of free, white persons as a way of denying any recognition of Philis as a family member. Moreover, the massive transformations stemming from the Civil War changed the composition of Durbin's estate. The Civil War, the Emancipation Proclamation, and the weakening of the southern plantocracy undermined Philis's claim to her share of Durbin's property. He neither lived to see the economic devaluation of his property nor the legal wranglings that weakened his own family's testamentary interests. He did not foresee that law would force his posthumous gifts toward the family that he wished to disinherit. These influences, in addition to the challenges presented by the Hubbells, precluded Philis, the rightful heir, from obtaining her due legacy.

This historical failure of donative intent stifles the possibility of marginalized families to secure their due inheritance. Not limited to finances alone, law's role in quashing the testator's intent underscores a collective belief in the normativity of traditional families. In this way, the larger legal system supports testamentary larceny in blatant contradiction to explicit legal language recognizing, promoting, and memorializing intimate connections between black and white. Testamentary freedom, in all of its aspirational claims, means nothing in the face of a legal system rooted in the restrictive and damaging conformity of "legitimate" families. In the case of the Remleys, Durbin's "family" did not exist as a reality in a legal regime that defined intimacy in terms of black and white, with nothing in between.